CLERK'S COPY 10172

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~185~~ 81.

HARRY J. JAQUITH, TRUSTEE IN BANKRUPTCY OF WILLIAM S. FRANKLIN, BANKRUPT, APPELLANT,

vs.

CLARENCE W. ROWLEY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED APRIL 18, 1901.

(18,115.)

(18,115.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 297

HARRY J. JAQUITH, TRUSTEE IN BANKRUPTCY OF WILLIAM S. FRANKLIN, BANKRUPT, APPELLANT,

vs.

CLARENCE W. ROWLEY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Caption	*a*	1
Petition in equity *vs.* C. W. Rowley *et al.*	1	1
Exhibit A—Letter of Clarence W. Rowley to H. J. Jaquith, January 18, 1901	1	2
B—Petition in Franklin *vs.* Flanders	5	3
C—Petition in Franklin *vs.* Thayer	6	4
D—Notice of dismissal of petitions in Franklin *vs.* Flanders and Same *vs.* Thayer	7	5
E—Proof of claim of Emily W. Thayer	8	5
Summons and return	11	6
Opinion of Lowell, J., February 20, 1901	12	7
Decree dismissing petition	14	8
Petition for rehearing and order allowing same	15	9
Summons and return	16	9
Motion of trustee to amend petition and order allowing same	17	10
Decree dismissing petition after rehearing	18	11
Extract from Schedule A	19	12
Petition for appeal and allowance of same	20	13
Assignment of errors	21	14
Certificate of Judge Lowell as to questions raised	23	15
Clerk's certificate to transcript	25	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1901.

a District Court of the United States, District of Massachusetts.
In Bankruptcy.

In the Matter of WILLIAM S. FRANKLIN, Bankrupt. No. 3327.

APPEAL RECORD.

1 *Trustee's Petition in Equity v. C. W. Rowley et al.*

Filed in Court Feb. 11, 1901.

District Court of the United States, District of Massachusetts.

In the Matter of W. S. FRANKLIN, Bankrupt. In Bankruptcy. No. 3327.

Petition in Equity.

Respectfully represents H. J. Jaquith, that he is the trustee in the above-entitled case, that the bankrupt was duly adjudicated such on the 15th day of August A. D. 1900, that your petitioner was appointed trustee on the 18th day of September A. D. 1900, and his bond was approved on the 21st day of September, 1900.

That on the date of said adjudication, there were pending in the superior court of Massachusetts for Middlesex county a suit of E. W. Thayer *vs.* The Bankrupt in which a bail bond was taken on the 14th day of November A. D 1899, and that to protect his surety on said bail bond one Joseph P. Silsby, Jr., the bankrupt deposited in his hands the sum of one hundred and forty-eight dollars to be held to indemnify him in case the bankrupt avoided said bail bond, and also a suit of E. F. Flanders *vs.* The Bankrupt in which case a bail bond was given on the 14th day of November A. D. 1899, and to protect his surety, one, Joseph P. Silsby, Jr., the bankrupt deposited in his hands the sum of one hundred and twenty-five dollars to be held to indemnify him in case the bankrupt avoided said bail bond, that the counsel for both Thayer and Flanders is one Clarence W. Rowley, a member of the bar of this court, that said Rowley appeared at the first meeting of the creditors of the bankrupt and proved the claim of the aforesaid Emily W. Thayer and participated in said meeting, and that said claim is now pending before the referee Honorable L. G. Farmer, for allowance.

2 That before your petitioner had filed his bond, said Rowley called upon him and asked to have the suits disposed of so that he could get the money from the surety, that your petitioner replied that several creditors, among them, the aforesaid Thayer had requested an examination of the bankrupt, and that until that was had your petitioner did not feel that he had sufficient information to act, that about a week later, your petitioner had another conversation with said Rowley at the Suffolk county court-house, at which the same request was made, and the same answer given, that thereafter said Rowley made no request to examine the bankrupt.

That on January 17, 1901, your petitioner as counsel for the bankrupt filed interrogatories to the aforesaid plaintiffs, and on the 18th day of January, 1901, he received a letter from the aforesaid Rowley saying that he had taken judgment and execution in said suits, a copy of the letter is annexed marked A.

That thereupon your petitioner continuing to act for said Franklin for the benefit of his creditors filed petitions in both of said cases praying that the judgments be vacated and execution be returned, copies of said petitions are annexed marked B & C.

That on the 7th day of February A. D. 1901, the superior court for Middlesex county ordered the petitions dismissed, a copy of the order of the court is annexed marked D.

Your petitioner further represents that the action of said Rowley and said Thayer and Flanders, in further prosecuting said suits in the State courts was contrary to the bankruptcy act, that the further prosecution of the suit of Thayer after proving the debt in this court was an attempt to oust this court of its jurisdiction and is a contempt of this court, a copy of the proof of said claim is annexed marked E.

That the obtaining of the judgments without notice to your petitioner, under the circumstances herein set out was a fraud
3 upon the creditors of the bankrupt, this court not having ordered or authorized any defense of said suits.

Wherefore your petitioner prays:

1. That said Clarence W. Rowley, E. W. Thayer and E. F. Flanders, their agents and attorneys be enjoined from collecting said judgments or making any levy under said executions or taking any further proceedings thereon pending the further and final determination of this court.

2. That said Joseph P. Sibley, Jr. be enjoined from paying over the money in his hands pending the further orders of this court.

3. That said C. W. Rowley and E. W. Thayer be ordered to show cause why they should not be adjudged in contempt of this court.

4. That said C. W. Rowley and E. W. Thayer be ordered to pay the costs incurred by your petitioner in the State courts occasioned by their fraudulent acts set out herein.

H. J. JAQUITH.

SUFFOLK, *ss:*

BOSTON, *February* 11, 1901.

Personally appeared the above-named H. J. Jaquith and made oath that he has read the above petition subscribed by him and that the facts alleged therein are true.

Before me,

THOMAS J. BARRY,
Justice of the Peace.

4

JAN. 18, 1901.

H. J. Jaquith, Esq., 48 Congress St., Boston, Mass.

DEAR SIR: Your notice of filing interrogatories in the cases of Thayer and Flanders *vs.* Franklin is received. These cases went to judgment some time ago, no suggestion of bankruptcy being filed

and no one appearing for the defendant when the cases were reached for trial.

Very truly yours, CLARENCE W. ROWLEY.

Exhibit A.

5 COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *ss*:

Superior Court.

FRANKLIN
vs.
FLANDERS.

Now comes the petitioner and moves that the judgment entered in this court in the case of Flanders v. Franklin, on the 18th day of October A. D. 1900 be vacated and that the execution issued be ordered returned, and that further proceedings be stayed for twelve months from August 15, 1900, and for grounds and for this his motion, he says that on the 15th day of August, 1900, he was adjudicated a bankrupt in the district court of the United States for the district of Massachusetts.

That Clarence W. Rowley, the attorney of record for the plaintiff in this suit, was present and took part in the first meeting of the creditors, and that the plaintiff in this action had actual knowledge of the said bankruptcy proceedings.

That the terms of the national bankruptcy law, section 11, *a*, are as follows: Suits by and against bankrupts.—A suit which is founded on a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudicated a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

That, nevertheless, the plaintiff in said suit without informing this court of the bankruptcy of the defendant on or about October 5, 1900, obtained a default and an execution was issued and levied on property of the defendant in the hands of Joseph P. Silsby, Jr. a deputy sheriff for the county of Suffolk.

And the defendant says that said judgment was fraudulently obtained, and is null and void.

Wherefore, he prays that an order to return the execution into court may be issued forthwith.

By his attorney, —— ——.

Exhibit B.

6 COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *ss.*:

Superior Court.

FRANKLIN
vs.
THAYER.

Now comes the petitioner and moves that the judgment entered in this court in the case of Thayer *v.* Franklin, on the 18th day of October A. D. 1900 be vacated and that the execution issued be ordered returned, and that further proceedings be stayed for twelve months from August 15, 1900, and for grounds and for this his motion, he says that on the 15th day of August, 1900, he was adjudicated a bankrupt in the district court of the United States for the district of Massachusetts.

That Clarence W. Rowley, the attorney of record for the plaintiff in this suit, was present and took part in the first meeting of the creditors, and that the plaintiff in this action had actual knowledge of the said bankruptcy proceedings.

That the terms of the national bankruptcy law, section 11, *a*, are as follows: Suits by and against bankrupts.—A suit which is founded on a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudicated a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

That, nevertheless, the plaintiff in said suit without informing this court of the bankruptcy of the defendant on or about October 5, 1900, obtained a default and an execution was issued and levied on property of the defendant in the hands of Joseph P. Silsby, Jr. a deputy sheriff for the county of Suffolk.

And the defendant says that said judgment was fraudulently obtained, and is null and void.

Wherefore, he prays that an order to return the execution into court may be issued forthwith.

By his attorney, —— ——.

Exhibit C.

7 COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *ss.*:

No. 7834, 7835.

SUPERIOR COURT, *February* 7, 1901.

H. J. Jaquith, Esq., *Esq.*:

In FRANKLIN
vs.
THAYER.

FRANKLIN
vs.
FLANDERS.

The court has directed the following entry to be made:
Petition dismissed.

Very truly yours, THEO. C. HURD, *Clerk.*

Exhibit D.

8 Wm. S. Franklin to Emily W. Thayer, Dr.

March, 1898. To services in going from Shirley, Mass. to New Bedford, Mass. for you, assisting in preparation of case of Adams *v.* Swift, attending the trial thereof without being summoned, and various services rendered in said case as per agreement..... $150

9 In the District Court of the United States for the District of Massachusetts.

In the Matter of WM. S. FRANKLIN, Bankrupt. No. 3327. In Bankruptcy.

At Boston, in said district of Massachusetts, on the eighteenth day of September, A. D. 1900, came Emily W. Thayer, of Boston, in the county of Suffolk, in said district of Massachusetts, and made oath, and says that Wm. S. Franklin, the person by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of one hundred and fifty dollars; that the consideration of said debt is as follows:

Services in attending court at New Bedford, Mass. assisting in preparing a case of Adams *v.* Swift for trial, and travelling from Shirley, Mass. to New Bedford, according to agreement with said W. S. Franklin, March, 1898, as per acc't annexed

that no part of said debt has been paid; that there are no set-offs or counter claims to the same; that no note has been received for such account, and no judgment rendered thereon; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt

whatever, except a bail bond for the appearance of said Franklin before the superior court for Middlesex county, Massachusetts, to answer to said Thayer in an action to recover the above claim, and a claim upon $273 deposited with the surety on said bond by said Franklin to be applied to any judgment recovered, which security she does not waive.

MRS. EMILY W. THAYER, *Creditor.*

Subscribed and sworn to before me this eighteenth day of September, A. D. 1900.

CLARENCE W. ROWLEY,
Justice of the Peace.

10 CLARENCE W. ROWLEY,
Attorney, 373 Washington Str.

I hereby certify that the above is a true copy of a claim proved before me, but not yet allowed in the case of said bankrupt.

LEWIS G. FARMER,
Referee in Bankruptcy.

Boston, February 4, 1901.

Exhibit E.

11 UNITED STATES OF AMERICA, *Massachusetts District,* } ss:

[SEAL.] The President of the United States of America to the marshal of our district of Massachusetts or to either of his deputies, Greeting:

We command you that you summon Clarence W. Rowley and Joseph P. Silsby, Jr., both of Boston in the district of Massachusetts, and Emily W. Thayer and E. F. Flanders, both of said district, (if they may be found in your precinct,) to appear before the district court of the United States, to be holden at Boston, within and for the Massachusetts district, on Wednesday, the 13th day of February, at twelve o'clock, m., then and there to show cause, if any they have, why an injunction should not issue against them restraining them from collecting any judgment, or levying any execution, or paying over any money held as security in these suits of E. W. Thayer, and E. F. Flanders *vs.* W. S. Franklin a bankrupt duly adjudicated such by this court, as prayed for by Harry J. Jaquith, the trustee of said bankrupt estate duly appointed by this court in the bill of complaint this day filed in said court.

Hereof fail not, and make due return of this writ, with your doings thereon, into our said court.

Witness, the Honorable Francis C. Lowell, at Boston aforesaid, the eleventh day of February in the year of our Lord one thousand nine hundred and one.

WILLIAM NELSON,
Deputy Clerk.

(*Marshal's Return.*)

UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

BOSTON, *February 12th*, 1901.

Pursuant hereunto, I have this day summoned the within-named Rowley and Silsby, Jr., to appear before the district court of the United States, as within directed, by giving in hand to said Rowley this day at Boston a true and attested copy of this precept. I also on the same day left at the last and usual place of abode of said Silsby, Jr., 766 Shawmut Ave., Boston, a true and attested copy of this precept, made search for within-named Thayer and Flanders and was unable to find them in my district.

J. H. WATERS,
Deputy U. S. Marshal.

Fees.

Service	$4.00
Travel	.12
	4.12

12 District Court of the United States, District of Massachusetts.

In the Matter of WILLIAM S. FRANKLIN, Bankrupt. No. 3327. In Bankruptcy.

Opinion.

February 20, 1901.

LOWELL, *J.*:

At the date of the adjudication there was pending against the bankrupt in a State court a suit in which a bail bond had been taken. To protect the surety on that bond, the bankrupt had deposited with him a sum of money. After adjudication, the plaintiff in the suit proceeded to judgment and took out execution, which he is seeking to enforce against the surety on the bail bond, but not against the bankrupt himself. The trustee seeks to restrain the enforcement of the judgment and execution, alleging that he had a good defence to the action, which he was prevented from presenting to the State court by a breach of an agreement made with him by the plaintiff's counsel.

By section 11 of the bankrupt act, this court is given power to stay suits against the bankrupt until twelve months after the date of adjudication, or until the question of discharge is determined. The State court, however, following the decision in Rosenthal *v.* Nove, 175 Mass. 559, held that, for the purpose of enforcing the liability on the bail bond, the case should proceed to judgment. The decision of the supreme court of Massachusetts is not opposed to the decisions of this court. *In re* Marshal Paper Co. 95 Fed. Rep. 419; same case on appeal, 102 Fed. Rep. 872. It was

contended, however, that, in the case at bar, there was in the hands of the surety money of the bankrupt, and that if the
13 plaintiff in the State court were permitted to enforce the bail bond, the surety on that bond would be entitled to apply to his indemnity the money deposited by the bankrupt, and so the bankrupt's estate would be diminished. It is hard to see how this court can compel the State court to try again the liability on the bond. The liability of the surety is a question within the jurisdiction of that court. If, indeed, it be taken that the judgment of that court was recovered by means of a fraud committed upon the trustee, it may be that this court has jurisdiction to restrain the enforcement of the judgment until the trustee has had opportunity to ask the State court to reopen the matter, and give him a hearing: but in this case, the trustee has already asked the State court for a rehearing, and has urged, or has had an opportunity to urge upon that court the alleged improper proceeding of the plaintiff's counsel. The State court has refused to reopen the case, and this court, even if it has jurisdiction to do so, is not disposed to review the decision of that court upon the facts. That the result of a suit brought against the bankrupt in a State court may thus result in the diminution of his estate applicable in bankruptcy to the payment of his debts, is not a conclusive reason for restraining the prosecution of that suit, when the personal liberty of the bankrupt is not threatened, and when the judgment sought for is not to be enforced against him, but against some one else. The case of *In re* Horton, 102 Fed. Rep. 986, though not precisely in point, is, in many respects, much like the case at bar.

14 In the District Court of the United States for the District of Massachusetts.

In the Matter of WILLIAM S. FRANKLIN, Bankrupt. No. 3327. In Bankruptcy.

At Boston, in said district, on the 21st day of February, A. D. 1901, upon the petition of Harry J. Jaquith, trustee in bankruptcy in the above-named matter, filed in the office of the clerk of said court on the 11th day of February, A. D. 1901, praying that a restraining order be issued, now therefore, after hearing arguments of Harry J. Jaquith, trustee and of Clarence W. Rowley, attorney for respondents, and after due consideration of the same:

It is hereby ordered and decreed that said petition be, and it hereby is, denied.

Witness the Honorable Francis C. Lowell, judge of the said court, and seal thereof, at Boston in said district, on the 21st day of February, A. D. 1901.

[SEAL.] F. S. FISKE,
Deputy Clerk.

15 *Petition of Trustee for Rehearing and Order Thereon.*

Filed in court Feb. 28, 1901.

District Court of the United States, District of Massachusetts.

In the Matter of W. S. FRANKLIN, Bankrupt. No. 3327. In Bankruptcy.

Petition of trustee for rehearing of petition for injunction *vs.* Rowley *et al.*

Respectfully represents H. J. Jaquith, that he is trustee in the above-entitled case, that his petition to have C. W. Rowley, E. F. Flanders, E. W. Thayer and Joseph P. Silsby, Jr., enjoined from prosecuting judgment *vs.* the bankrupt and paying over money alleged to belong to the bankrupt's estate involve the question of the jurisdiction of this court, and that the decision of this court is against the claim of jurisdiction alleged by your petitioner, wherefore your petitioner prays that he may be granted a rehearing on his aforesaid petition and may be allowed to introduce further evidence on the question of jurisdiction and to reargue said question.

H. J. JAQUITH, *Trustee.*

The foregoing petition is hereby granted.
By order of court, this 2nd day of March, A. D. 1901.

F. S. FISKE,
Deputy Clerk.

16 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

[SEAL.] The President of the United States of America to the marshal of our district of Massachusetts, or to either of his deputies, Greeting:

We command you that you summon Clarence W. Rowley and Joseph P. Silsby, Jr., both of Boston in the district of Massachusetts, and Emily W. Thayer of Shirley and Edwin F. Flanders of Shirley in said district, (if they may be found in your precinct), to appear before the district court of the United States, to be holden at Boston, within and for the Massachusetts district, on Monday the eighteenth day of March, A. D. 1901, at two o'clock p. m., then and there to show cause, if any they have, why an injunction should not issue against them restraining them from collecting any judgment or levying any execution, or paying over any money held as security in the suits of E. W. Thayer and E. F. Flanders *vs.* W. S. Franklin a bankrupt duly adjudicated such by this court, as prayed for by Harry J. Jaquith, the trustee of said bankrupt estate duly appointed by this court in the bill of complaint this day filed in said court.

Hereof fail not, and make due return of this writ, with your doings thereon, into our said court.

Witness, the Honorable Francis C. Lowell, at Boston aforesaid,

the 4th day of March in the year of our Lord one thousand nine hundred and one.

F. S. FISKE,
Deputy Clerk.

(*Marshal's Return.*)

UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

BOSTON, *March* 9, 1901.

Pursuant hereunto, I have this day summoned the within-named Edwin F. Flanders, to appear before the district court of the United States, as within directed, by leaving at his last and usual place of abode at Shirley, in hand to W. H. Dodge the person I found in charge, a true and attested copy of this precept. I made no further service of the within precept, by order of counsel.

ALBERT TUTTLE,
Deputy U. S. Marshal.

Fees.

Service	$2.00
Ex. in lieu of travel	3.35
	$5.35

17 *Motion of Trustee to Amend Petition for Restraining Order and Order Thereon.*

Filed in court March 18, 1901.

District Court of the United States, District of Massachusetts.

In the Matter of W. S. FRANKLIN, Bankrupt. No. 3327. In Bankruptcy.

MOTION OF TRUSTEES TO AMEND PETITION
vs.
E. W. THAYER ET AL.

Now comes H. J. Jaquith, trustee, in the above-entitled action and asks leave to amend his said petition, by striking out the prayers and substituting, therefor the following prayers,—

1. That said C. W. Rowley, E. W. Thayer, and E. F. Flanders, be permanently enjoined from collecting said judgments or making any levy under said executions, or taking any further proceedings under either said judgments or executions.

2. That said Joseph P. Silsby, Jr., be ordered to pay over to the trustee, the funds deposited in his hands, by the bankrupt.

3. That the said E. W. Thayer and E. F. Flanders, be ordered to appear before Lewis G. Farmer, Esq., the referee in bankruptcy, to whom the case of W. S. Franklin, bankrupt, has been referred and prove their claims against his estate and establish their liens, if any, upon the funds paid over to the trustee, by the aforesaid Joseph P. Silsby, Jr.

4. And for such other and further relief as may seem meet to this court.

H. J. JAQUITH,
Trustee, pro Se.

Upon the foregoing motion, after hearing the trustee, and counsel for respondent, it is hereby ordered that said motion be, and it hereby is, allowed. By order of court, March 18, 1901.

F. S. FISKE, *Dep. Clerk.*

18 In the District Court of the United States for the District of Massachusetts.

In the Matter of WILLIAM S. FRANKLIN, Bankrupt. No. 3327. In Bankruptcy.

At Boston, in said district, on the 18th day of March, A. D. 1901, upon the petition of Harry J. Jaquith, trustee in bankruptcy in the above-named matter, filed in the office of the clerk of said court on the 11th day of February, A. D. 1901, and the amendment thereto filed in said office and allowed by the court, on the 18th day of March, A. D. 1901, now therefore, after hearing arguments of Harry J. Jaquith, trustee, and of Clarence W. Rowley, attorney for respondents, and after due consideration of the same.

It is hereby ordered that said petition be, and it hereby is, denied, for want of jurisdiction, that thereupon, in open court, the aforesaid trustee prayed an appeal from said order denying trustee's petition.

Witness the Honorable Francis C. Lowell, judge of the said court, and seal thereof, at Boston in said district, on the 18th day of March, A. D. 1901.

[SEAL.]

F. S. FISKE,
Deputy Clerk.

19

EXTRACT FROM SCHEDULE A. (3) No. —.

Creditors Whose Claims are Unsecured.

(N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor . The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Reference to ledger or voucher.	Names of creditors.	Residence (if street and number are unknown, that fact must be stated.)	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount.
					c.
	Edwin F. Flanders...	Shirley, Mass., no street..	1897—New Bedford, Mass..	Contracted, if — all, as agent of Annie E. Adams; witness fees in Adams & Swift disputed.	$100
	Emerly W. Thayer...	Shirley, Mass., no street..	1897—New Bedford, Mass..	Contracted, if at all, as agent of Annie E. Adams; witness fees in Adams & Swift disputed.	150

20 *Trustee's Petition for Appeal.*

Filed in court Apr. 1, 1901.

District Court of the United States, District of Massachusetts.

In the Matter of W. S. FRANKLIN, Bankrupt. No. 3327. In Bankruptcy.

Petition of trustee for appeal.

To the honorable the district judge of the United States for the district of Massachusetts:

And now comes Harry J. Jaquith, the trustee in the above bankruptcy case and complains that manifest error hath happened to the great damage of your petitioner in the record and final judgment of this court on his petition to have C. W. Rowley, E. W. Thayer and E. F. Flanders enjoined from further proceedings in the courts of the State of Massachusetts against the bankrupt and from enforcing a judgment and execution there obtained against his estate, and to have J. P. Silsby, Jr., ordered to pay to the trustee property of the bankrupt in his hands.

Wherefore your petitioner prays that he may be allowed to appeal to the Supreme Court of the United States to the end that said error may be corrected and full and speedy justice done in this behalf.

And your petitioner files herewith an assignment of error which sets out separately and particularly each error asserted and intended to be urged.

HARRY J. JAQUITH,
Trustee pro Se.

Apr. 2, 1901.—Allowed.

FRANCIS C. LOWELL,
U. S. Dist. Judge.

21 *Assignment of Errors.*

Filed in court April 1, 1901.

District Court of the United States, District of Massachusetts.

In the Matter of W. S. FRANKLIN, Bankrupt. No. 3327. In Bankruptcy.

PETITION FOR INJUNCTION
vs.
ROWLEY ET AL.

Assignment of errors by appellant.

To the honorable the district judge of the United States for the district of Massachusetts:

And now comes Harry J. Jaquith, trustee of the aforesaid bankrupt estate and says that in the record and final judgment in the above-entitled proceedings there is error, in this, to wit:

1. That the final judgment denied the jurisdiction of this court to permanently enjoin a creditor of the bankrupt who has proved her debt in the bankruptcy court from collecting a judgment or levying an execution recovered in a State court upon such debt.

2. That the final judgment denied the jurisdiction of this court to permanently enjoin a creditor of the bankrupt who has not proved his debt in the bankruptcy court from collecting a judgment or levying an execution recovered in a State court upon such debt.

3. That the final judgment denied the jurisdiction of this court over controversies between the trustee and a third person in the possession of property alleged to belong to the bankrupt, it being also alleged that said third person has no beneficial interest in the said property, but has the sole duty of paying or delivering it over in settlement of the debts of the bankrupt.

4. That the final judgment denied the jurisdiction of this court to entertain jurisdiction of proceedings on a petition by a trus-
22 tee in bankruptcy to recover property alleged to belong to the bankrupt but held under a claim of lien or security by the bankrupt's creditor or by third party for the benefit of said creditor.

5. That the final judgment denied the jurisdiction of this court over this petition as it now stands on record.

HARRY J. JAQUITH,
Trustee, pro Se.

23 District Court of the United States, District of Massachusetts.

In the Matter of WILLIAM S. FRANKLIN, Bankrupt. No. 3327. In Bankruptcy.

Certificate.

LOWELL, *J.*:

In the above-entitled case, a rehearing having been granted and the petition having been amended, I certify that the defendants appeared before me, and in open court objected to the jurisdiction of this court, and that I thereupon dismissed the petition and denied the prayer thereof for want of jurisdiction only. To the end that the Supreme Court may be fully advised in the premises, I certify further that the following questions arose before me, namely:

1. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankruptcy act of 1898, control and limit the jurisdiction of the several district courts of the United States, so that said courts cannot permanently enjoin a creditor of the bankrupt who has proved his debt in the bankruptcy court, from collecting a judgment recovered in the State court and from making levy under an execution taken out on said judgment; and do they limit the jurisdiction of the said courts so that these courts may not require said creditor to submit the controversy to their judgment?

2. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankruptcy act of 1898, control and limit the jurisdiction of the several district courts of the United States, so that said courts cannot permanently enjoin a creditor of the bankrupt who has not proved his debt in the bankruptcy court,

24 from collecting a judgment recovered in the State court, and from making levy under execution taken out on said judgment; and do they limit the jurisdiction of the said courts so that these courts may not require said creditor to submit the controversy to their judgment?

3. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankruptcy act of 1898, control and limit the jurisdiction of the several district courts of the United States over controversies between the trustee and a third person in the possession of property alleged to belong to the bankrupt, it being also alleged that said third person has no beneficial interest in the said property, but has the sole duty of paying or delivering it over in settlement of the debts of the bankrupt?

4. Can the district court of the United States entertain jurisdiction of proceedings on petition by a trustee in bankruptcy to recover property alleged to belong to the bankrupt, but held under a claim of lien or security by the bankrupt's creditor, or by third parties for the benefit of said creditor?

5. Can the district court for the district of Massachusetts take jurisdiction over this suit as it now stands on record?

FRANCIS C. LOWELL,
U. S. District Judge.

25 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, Frank H. Mason, clerk of the district court of the United States for the district of Massachusetts, certify that the foregoing are true copies of the following papers filed in said court in the cause in bankruptcy:

WILLIAM S. FRANKLIN, Bankrupt. No. 3327.

Trustee's petition in equity *vs.* C. W. Rowley *et al.*
Order of notice thereon and marshal's return.
Opinion of court on trustee's original petition.
Order dismissing petition.
Petition of trustee for rehearing and order thereon.
Order of notice on petition for rehearing and marshal's return.
Motion of trustee to amend original petition and order thereon.
Order dismissing petition on rehearing and memorandum of appeal.
Trustee's petition for appeal.
Trustee's assignment of errors.
Together with the
Certificate of the court upon the questions raised.

And I further certify that the extract from the bankrupt's schedule is correctly copied from said schedule, the remainder of said schedule, having no connection with the matter, being omitted.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said district, this 3d day of April, A. D. 1901.

[Seal of the District Court, Massachusetts.]

FRANK H. MASON, *Clerk.*

Endorsed on cover: File No. 18,115. Massachusetts, D. C. U. S. Term No. 297. Harry J. Jaquith, trustee in bankruptcy of William S. Franklin, bankrupt, appellant, *vs.* Clarence W. Rowley, *et al.* Filed April 13th, 1901.

Supreme Court of the United States

No. 297. October Term, 1901

HARRY J. JAQUITH, Trustee in Bankruptcy of William S. FRANKLIN, Bankrupt, Appellant,

v.

CLARENCE W. ROWLEY et al.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the District of Massachusetts.

Statement of the Case

On November 8, 1899, Edwin F. Flanders and Emily W. Thayer alleging themselves creditors of William S. Franklin, the bankrupt, began separate actions through the same attorney, in the Superior Court of Massachusetts for the County of Middlesex, and on November 14, 1899, the writ was served by taking the body of said Franklin. Thereafter in order to secure his release, Franklin deposited with one

Joseph P. Silsby, Jr., two hundred and seventy-three dollars as security, whereupon said Silsby became surety on Franklin's bail bond which was conditioned to appear and answer to the suits (P. S. Mass., Chap. 163, Sec. 2,) as follows:

"Bail in a civil action shall be taken, as heretofore practised, by a bond to the sheriff, if the writ is served by him or his deputy, otherwise to the officer by whom the writ is served, with condition that the defendant shall appear and answer to the plaintiff, abide the final judgment of the court, and shall not avoid."

These suits were pending on Aug. 15, 1900, when Franklin was adjudicated a bankrupt, the appellant was appointed Franklin's trustee and qualified Sept. 21, 1900. At the first meeting of the creditors Clarence W. Rowley, attorney of record in the state court for both Flanders and Thayer, and a member of the bar of the United States Circuit and District Courts, appeared and proved the claim of Thayer for $150, and asserted a claim upon the whole $273 deposited with the surety. (Record, p. 5.)

October 18, 1900, said Rowley, upon behalf of both Flanders and Thayer, without leave of the bankruptcy court or notice to or knowledge of the trustee, took judgment by default in the suits in the state court. This did not come to the knowledge of the trustee until Jan. 18, 1901. Upon learning of it the trustee at once notified the surety not to pay the money over, (Record, p. 1) and at once in the name of the bankrupt petitioned the State Court to vacate the judgment and order the execution returned. (Record, p. p. 3, 4.) This the State Court denied, (Record, p. 5,) and thereupon the trustee filed his petition in the District Court of the United States for Massachusetts, setting out the facts and asking equitable relief against the appellees. This petition was denied Feb. 20, 1900, (Record, p. 7.) On the 28th of February, 1900, the District Court of the United States for Massachusetts granted a re-hearing, at which the Court permitted the trustee to amend his prayers for relief, the appellees appeared and denied the jurisdiction of the Court, and after argument the Court denied the petition for want of jurisdiction, and allowed an appeal to this Court. (Record, pp. 11, 15.)

FIRST AND SECOND ASSIGNMENTS

"That the final judgment denied the jurisdiction of this court to permanently enjoin a creditor of the bankrupt who has proved her debt in the bankruptcy court from collecting a judgment or levying an execution recovered in a State Court upon such debt."

"That the final judgment denied the jurisdiction of this Court to permanently enjoin a creditor of the bankrupt who has not proved his debt in the bankruptcy court from collecting a judgment or levying an execution recovered in a State Court upon such debt."

The first and second assignments of error raise the question of the jurisdiction of Courts of Bankruptcy under the law of 1898 over

a. Creditors who have proved their debts

b. Creditors who have not proved their debts.

To enjoin them from proceeding further on a judgment obtained without notice to the trustee and by default in a State Court, after the adjudication, and in a suit pending at the time of the adjudication and within a year thereof.

In the case at bar Silsby was not an "adverse claimant," and in determing whether or not he should be ordered to pay the money in his possession to the trustee, it was competent for the Court to cite in Flanders, Thayer and Rowley under powers conferred by Sec. 2, cl. 6 of Act of 1898, in order to completely determine the matter.

Bryan *v.* Bernheimer, 181 U. S. 188, 194, 197, 198.
Pirie *v.* Chic. T. & T. Co., 182 U. S. 438, 456.
In re Stokes, 106 F. R. 312.
In re Sheinbaum, 107 F. R. 247.

In the case at bar the creditor Thayer appeared and filed her claim, alleging and not waiving a security claimed.

This was a general appearance and gave to the bankruptcy court full power to deal with her claim and its security.

Act 1898, Sec. 2-7.
Pennoyer *v.* Neff, 95 U. S. 714.

In re Seebold, 105 F. R. 910, 914.

The security alleged was not *held* by the creditor within the sense of Sec. 57-h.

It is also submitted that Flanders as a creditor was a party and was before the court as a party, all creditors are parties.

In re Christy, 3 How. 292, 310.
Shawhan *v.* Wherritt, 7 How. 627, 643.
Bear *v.* Chase, 99 F. R. 920, 924.
Carter *v.* Hobbs, 92 F. R. 494, 497.
In re Cobb, 96 F. R. 821, 823.
Keegan *v.* King, 96 F. R. 758, 761.
In re Mason, 99 F. R. 256, 257.
In re Lesser, 100 F. R. 433, 438.
In re Fredenborg, F. C. 5075.
In re Lake, F. C. 7992.
Davis *v.* Anderson, F. C. 3623.
In re Davis, F. C. 3618.
Lee *v.* Savings Bank, F. C. 8188.

So that on notice his rights to alleged security might be determined on a petition in equity, ancillary to the bankruptcy proceedings.

White *v.* Ewing, 159 U. S. 36, 40.

The Court may compel a creditor to come in and prove and set out his security, and such security may then be passed on by the Court.

Bromley *v.* Smith, F. C. 1922.

"The fact of proof in bankruptcy defeats and annuls the suit and the attachment made therein."

Cook *v.* Coyle, 113 Mass. 252.

If the Court had jurisdiction of the parties it had jurisdiction of the cause.

Act 1898, Sec. 2. Sec. 2-15. Sec. 11.

A judgment obtained contrary to a prohibition is null and void.

Pennoyer *v.* Neff, 95 U. S. 714.

Federal courts will give relief against such a judgment.

Ins. Co. *v.* Hodgson, 7 Cranch, 332.

Where interests have been created for the purpose of preventing recovery relief will be granted.

Fosters Fed. Practice, Sec. 54 and cases cited.

Under the Massachusetts law bail is discharged in civil actions if the defendant is released from his liability to arrest by operation of law, and it was not necessary to surrender the bankrupt in order to maintain the claim of the estate upon the funds in the hands of Silsby.

Ingersoll *v.* Strong, 9 Met. 447, 453.
Collamore *v.* Fernald, 3 Gray, 318.
Carpenter *v.* Turrell, 100 Mass. 452.
Long *v.* Dickerson, 15 Blatch, 459.
Beers *v.* Haughton, 9 Pet. 329, 358.

Had the suits been pending they might have been stayed.

Hill *v.* Harding, 107 U. S. 631.
Boynton *v.* Ball, 121 U. S. 457.
In re Basch, 97 F. R. 761.
St. Cyr *v.* Daignault, 103 F. R. 854.
In re Neely, 108, F. R. 371.

As the suits had gone to judgment and execution had been issued but not satisfied, injunction was the appropriate and equitable relief.

THIRD ASSIGNMENT

"That the final judgment denied the jurisdiction of this court over controversies between the trustee and a third person in the possession of property alleged to belong to the bankrupt, it being also alleged that said third person has no beneficial interest in the said property but has the sole duty of paying or delivering it over in settlement of the debts of the bankrupt."

The third assignment of error is supported by the following cases:

Chapman *v.* Brewer, 114 U. S. 158, 172, 173.
Bryan *v.* Bernheimer, 181 U. S. 188.
Pirie *v.* Chic. T. & T. Co., 182 U. S. 438.
Wall *v.* Cox, 101 F. R. 403.
Hall *v.* Kincell, 102, 301.

FOURTH ASSIGNMENT

"That the final judgment denied the jurisdiction of this court to entertain jurisdiction of proceedings on a petition by a trustee in bankruptcy to recover property alleged to belong to the bankrupt, but held under a claim of lien or security by the bankrupt's creditor or by third party for the benefit of said creditor."

The fourth assignment of error seems to be supported by the text of the Bankruptcy Act and by the principles of construction heretofore adopted by this court, and which it is submitted must be taken to have been in the minds of the framers of the Act and have been the intent of Congress in passing the Act.

Sharpe *v.* Doyle, 102 U. S. 686, 689.
Feibelman *v.* Packard, 109 U. S. 421, 426.
In re Metzler (Blatchford, J.) F. C. 9512.

FIFTH ASSIGNMENT

"That the final judgment denied the jurisdiction of this court over this petition as it now stands on record."

The merits of the fifth assignment of error seem to require a brief review of some of the provisions of the Act and of some of the prior decisions of this court.

The constitutional power of Congress is to establish uniform laws on the subject of bankruptcies.

U. S. Con. Art. 1, Sec. 8.

The judicial power of Federal Courts extends to all cases in law and equity arising under the constitution or laws of the United States.

U. S. Con. Art. 3, Sec. 2.

And it is imperative that the whole judicial power necessary to enforce the Constitution and laws of the United States shall be invested in the Federal Judiciary.

Martin *v.* Hunter, 1 Wheaton, 304, 330, 331.

While by article 6 of the U. S. Constitution, the constitutional laws of the United States are made the Supreme law of the land and state court judges, bound by them, regardless of state constitutions and laws, still Congress can only vest the power to enforce them in the Federal Judiciary.

Story on Con. Sec. 1501, 1503.

And the grant given to the judiciary in the constitution is absolute and beyond the control of Congress.

Story on Con. Sec. 1594.
Ex parte Christy, 3 How. 292, 316.
Lathrop *v.* Drake, 91 U. S. 516, 518.

"It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction it has a right to decide every question which occurs in the cause."

Peck *v.* Jenness, 7 How. 617, 624.
Ogden *v.* Saunders, 12 Wheat. 213, 367.

Under the bankruptcy act the bankruptcy court has equity powers in matters within its jurisdiction. Sec. 2. It must collect the estate. Sec. 2-6, 7. Sec. 38-3. Sec. 47-2. And may appoint receivers. Sec. 2-3 and 5. May release bankrupt from custody of State Courts. Sec. 9. May stay suits in State Courts. Sec. 11. Can marshal securities. Section 5, G. Sec. 65, E. It may allow or disallow the claims of creditors. Sec. 2-2. Sec. 55-B. Sec. 57. Sec. 68. May order arbitration, litigation or compromise, and these provisions must certainly have reference to litigation pending in the State Courts as it is an unnecessary provision where cases are pending in the bankruptcy courts, it shows the intent of Congress that all litigation after the adjudication should be controlled by the bankruptcy court.

Section 26-A. Sec. 27. Sec. 57-H. Sec. 63-b. Sec. 11.

"Universally, after the law takes the bankrupt into its own hands his creditors are prohibited from suing."

Ogden *v.* Saunders, 12 Wheat. 213, 365.

May order conveyances by bankrupt or creditor. Section 7-4. Sec. 67-F. May pass on the nulity of judgments, etc., as preferences, uncontrolled by section 23.

Section 60. Sec. 67-A, B. C. D. F.

It is submitted that the word "transfers" as used in section 1-25, section 3-A, 1 and 2, section 3-b and section 60-a has a different and wider significance than the same word used in section 67-e, section 70, a-4, and section 70-e. This is evident from connecting with it in section 67-e the words "conveyances, assignments or encumbrances," words having no significance if the meaning is not different from the definition in section 1-25, and it is of acts of this more limited definition that section 67 provides that the trustees may reclaim and recover, and in section 70 that the trustee may avoid and recover. It is submitted that it is to such proceedings as these that the provisions of section 23-b are applicable. These seem to be the class of actions styled suits in section 46.

In the following sections the act refers to suits by trustees as distinguished from bankruptcy proceedings:

Section 11. Sec. 23. Sec. 46-a. Sec. 57-n. Sec. 67-e. Sec. 70-e.

Section 2-7 and 15 and section 47-2 and section 57-e, f, g, h, gives the bankruptcy court full and complete power to collect in the estates, to appoint trustees to act under the directions of the court, to determine whether preferences exist where the creditor comes into court to determine his securities, their amount and liquidation to determine the nullity of liens acquired within four months prior to adjudication and to make necessary orders to carry into effect the purposes of the act.

Now none of these latter are suits within the meaning of the act. They are the administrative acts of the court itself, in which the trustee plays no part, except that as an officer of the court, he calls to its attention such conditions as seem to him to show that the court should exercise the powers conferred, to make the will of Congress effective. He is as much an officer of the Court and a part of the Court as the referee.

It is clear that no separate suit is necessary in these matters, due notice under the bankruptcy proceedings is all that is required, Sec. 58 and 67, and apparently, this is because in these matters the rights of creditors only are being adjudicated and they are all drawn into court by the bankruptcy. They hold as security or lien, by virtue of the bankrupt's title, and under it they cannot dispute the bankrupt's title and hold their security, therefore the bankruptcy court may determine the fact of the lien or security, its amount, and order its liquidation.

Not so with conveyances, transfers, assignments, encumbrances, or liabilities for torts to properties, or conveyances in fraud of the statute of Elizabeth. These are not held as securities. The transfers are absolute, no title or right to redeem, remaining in the bankrupt and no debt against the bankrupt's estate remaining in the hands of his transferee. They clearly constitute a separate class, subject to the restrictions of Sec. 23-b.

The text of the act shows a clear cause for this distinction, by Sec. 17, a bankrupt is only discharged from a provable debt, by Sec. 57, secured or preferred debts, are only provable after liquidation of the security, and by Sec. 63, unliquidated claims are only provable after liquidation. Now it is impossible in the courts of the large cities or in any state in case an appeal is taken from the lower court, to try out such litigation within the space of one year from adjudication, provided either party is disinclined, so to do, yet, under the provisions of section 57-n, if such matters have not proceeded to final judgment within one year and one month or under the most favorable construction, one year and three months, the creditor is barred from proving his claim, and as the debt could not be proved under the act, the bankrupt will not be discharged therefrom. This construction seems to follow the proposition that the defendant by refusing consent can prevent the bankruptcy court from taking jurisdiction.

It is submitted that mere rights to recover property vesting in the Trustee under the provisions of section 70-a-4, 70-a-6, 70-e, must be pursued under the limitations of section 23, but that as a general proposition collecting and administering the other forms of property, mentioned in section 70, is within the jurisdiction of the District Court.

Section 23-a defines the jurisdiction of the Circuit Court solely. It is not until we reach section 23-b that we find any limitation upon the general powers of the District Court to draw to it all matters in controversy relating to the res being administered by it. This section permits all actions to be brought in the District Court by consent of defendant, a jurisdiction withheld from the Circuit Court, but if there is no consent all suits by the Trustee must be brought in the forum to which the bankrupt, prior to his adjudication, might have appealed.

The decision in Bardes *vs.* Bank, 178 U. S. 524, must be interpreted by the cases which it cites. Take the case of Morgan *vs.* Thornhill, 11 Wal. 65 and on page 75, we find that the decision governs only that class of cases or suits in which the action must be brought in the name of "one of

the two parties named in the clause" (U. S. R. S. Sec. 49, 79.) That is, in the name of the assignee or of the adverse claimant.

We find this distinction emphasized by reference to other portions of the act, in Sec. 63-b, the court is to direct the manner of liquidation of claims, it may determine them itself if there is no pending suit, or it may order the trustee to appear in a state court and defend a suit there pending.

Under Sec. 57, e, the court may determine the value of securities held and allow the rest of the claim, this imports also a power to determine whether there is any security at all, and if it has such power its decision must be res adjudicata if not appealed from, it would be a strange doctrine that with power to collect estates and determine controversies, the Federal Courts must implore the aid of State Courts to make their judgments effective.

Under Sec. 57, cl. f, objections to claims are to be heard and determined by the court, the objections that may be raised are, preferences, securities, counter claims and errors. Can it be said that the court shall determine that which it cannot determine? Can it be inferred that Congress intended to reduce the Federal Judiciary to moot courts?

Nor can it be argued from clause g, same section, that the purpose is to ascertain facts on which to found the rejections of claims alone, as under clause h, same section, the court has power to control the liquidation of the securities in any of the ordinary methods that it sees fit to direct.

The provisions of Sec. 67, e and f, clearly note the distinction drawn by Congress and outlined in Bardes *vs.* Bank in the matter of jurisdiction, under the sub-head of Liens Congress included every species of conveyance that might prove a fraud upon creditors, it then sub-divided them into those created by voluntary act and those created by adverse acts of courts, under color of local law.

True, the constitution of the United States enjoins upon State Judges the duty of upholding the paramount law of the land, but State Judges take their law from their own Supreme Courts and under these conditions there can not be uniformity in construing an act and the local forms and pro-

cesses may be such as to strip the Act of Congress of all efficiency and leave to the Bankruptcy Court nothing but naked rights incapable of enforcement, the property having been dissipated under local forms of law. It is submitted that Congress never intended to deprive the Federal Courts of the power to enforce a federal law, hence, Congress having incorporated in the bill the provisions set out in sections 9, 11, 57, 63, 67 and 70, inserted also the provision in Sec. 2-15, which powers may be enforced under the general provisions of Sec. 2 by the processes of a law or of an equity Court, and to make such procedure possible, and effective, Sec. 2, cl. 6, was enacted.

It is not contended that jurisdiction of actions by a trustee in his own name to recover debts or to avoid voluntary acts of the bankrupt enumerated in section 67-e is within the scope of these powers, that was settled in Bardes *v.* Bank, but that all matters on which parties may be brought into the bankruptcy proceedings on notice may be settled under these powers, as for example, all matters relating to claims of creditors set out in sections 57, 63 and 67, except 67-e, and it is familiar law, that, once the jurisdiction of a court, having equity jurisdiction attaches, that jurisdiction exists to the full determination of the whole controversy. The general observation of this court as to the purpose of the powers conferred on bankruptcy courts, in Ex parte Christie, 3 How. on page 314, holds good today.

In Bardes *v.* Bank this court cites the caution of Justice Curtis in Carroll *v.* Carroll against taking the opinion in Ex parte Christie as binding authority for more than the case presented for determination, and we receive this as an intimation that we are not to take the opinion in Bardes *v.* Bank as intended to be binding, except within the same limits. That case was an action to recover goods, voluntarily and absolutely, conveyed by the bankrupt, which conveyance was good except it contravened section 67-e. The decision was that on the facts presented there was no jurisdiction in the District Court. On the facts the case came clearly within section 67-e and not within section 60, as the bank was not a creditor, and therefore, it was not brought into court

by publication and notice in the bankruptcy proceeding. It had no provable debt; it had no power of election; it was paid in full.

See relating to creditors. Sec. 1-9 and 23. Sec. 18. Sec. 21, Chap. 6. Sec. 63 and 67.

All creditors are described as claimants, and their interests must necessarily be adverse to the estate. Sec. 21-c. Sec. 65-e. But they are not adverse claimants as defined in Bardes *v.* Bank, 178 U. S. 532, 538. And the power to bring in other parties is not incompatible with section 23-b.

Section 2-6, 5-c, 9-2, 11-a, 67-f.
White *v.* Ewing, 159 U. S. 36, 40.

And in the following cases it is apparent that creditors can be brought in on notice.

Sec. 21-c, 24-b, 39-4, 55, 58-b, 59-d, 67-f.
Ingersoll *v.* Strong, 9 Met. 447, 453.
Collomore *v.* Fernald, 3 Gray, 318.

It is respectfully submitted that when Congress determined to enact a bankruptcy law and created the District Courts, Courts of Bankruptcy, it did it for the reasons and purposes set out in Ex parte Christie, 3 How. 314. Uniformity, economy and despatch were clearly within its intent; the office of referee was created and invested with most of the administrative powers of the Court, nearly all the proceedings were required to be held in the county of the bankrupt with an appeal by certificate to the District Judge whose court was to be always open with full powers in term time or vacation, but in the wisdom of Congress referees were not constituted law courts with juries, nor equity courts, yet there must be more or less involved in the workings of a bankruptcy act, rights, which cannot be constitutionally passed upon except by a jury or by a judge constitutionally qualified, and holding office during good behavior. (Con. U. S. Act 3, Sec. 1.) These rights are clearly set out in

Marshall *v.* Knox, 16 Wal. 551, 556, and hence in order that oppression might not be done, that defendants might not be put to great expense of travel and witnesses, compelled to attend a District Court at the farther end of the district, Congress enacted that except by consent these suits to "recover" to "reclaim" should be brought in the State Courts.

Experience under the act has demonstrated the wisdom of the provision, for a very large number of suits to recover have been brought without any foundation except the suspicions of inexperienced trustees, backed by the fact that the litigation was paid for out of a fund, and that the trustee's lawyer had spare time not otherwise required in his practice.

But on the other hand it seems that Congress intended to have the District Court settle, and settle within one year, every question connected with a creditor's claim and his security, and if such matters must be settled within a year, only the District Court can do it in many sections of the country, and especially in those sections most rich and most populous where the bankruptcy cases are largest in number and amount.

In Suffolk County, Massachusetts, a jury case involving $2,000 or more cannot be reached short of eighteen months to two years, and while a smaller case could be tried in three or four months, an exception to the Supreme Court would delay final judgment beyond the term allowed by the bankruptcy act for proving the claim, therefore it seems not to be unreasonable to suppose that the framers of the act knew of and had these conditions in mind and only intended that suits against third parties, not creditors, strangers to the bankruptcy proceedings, should go to the State Courts, but that everything pertaining to bankrupt and creditor, including all accountings and securities between them, should be exclusively heard and determined by the District Court, except that that court ordered the question tried out in a pending suit.

This view seems to be supported by the prohibition upon trustees venturing into pending suits except by order of the court.

Price *v.* Price, 48 F. R. 823.
Sec. 11-b.
In re Klein, 97 F. R. 31.
Bear *v.* Chase, 99 F. R. 920.

And this is particularly true where the litigation in the State Court is practically ended.

Traders Bank *v.* Campbell, 14 Wal. 87, 95, 96.
Norton *v.* Switzer, 93 U. S. 355, 364.

It seems to the appellant that the subject matter of his petition to the District Court did not constitute a suit within the meaning of the act, but only an ancillary proceeding and that the parties summoned in were not adverse claimants within the words of the Act of Congress or within its intent, or within the prior decisions of this Court, but that the matter involved was purely administrative to carry into effect the purposes of the Act, and that the District Court had jurisdiction and full power to make any orders therein, according to the usual practice of equity courts, which in its judgment the facts might seem to warrant.

The appellant respectfully submits that under the Bankruptcy Act the District Court of Massachusetts has jurisdiction to hear and determine the matter set out in the record, and to make such orders as may be necessary for the enforcement of the provisions of the Act.

H. J. JAQUITH
pro se

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 81.

HARRY J. JAQUITH, TRUSTEE, APPELLANT,

vs.

CLARENCE W. ROWLEY ET AL.

BRIEF FOR THE APPELLEES.

This is an appeal from a judgment of the district court of the United States for the district of Massachusetts, dismissing the "petition in equity" for want of jurisdiction.

Nine distinct choses in action were involved in the "petition in equity," each of which required a trial in the court or courts where the bankrupt might have prosecuted them if proceedings in bankruptcy had not been instituted. These choses in action are—

(1.) The cause of action in Thayer *vs.* Franklin, an action of contract in the Middlesex superior court (Record, p. 1).

(2.) The cause of action in Flanders *vs.* Franklin, an action of contract in the Middlesex superior court (Record, p. 1).

(3.) The cause of action in Franklin *vs.* Flanders, a petition to vacate judgment brought by this appellant in the Middlesex superior court (Record, pp. 2, 3).

(4.) The cause of action in Franklin *vs.* Thayer, a petition to vacate judgment brought by this appellant in the Middlesex superior court (Record, pp. 2, 4).

(5.) The claim of Thayer against the surety Silsby on Franklin's bail bond (Record, p. 1).

(6.) The claim of Flanders against the surety Silsby on Franklin's bail bond (Record, p. 1).

(7.) The claim of the surety Silsby upon the money he held to indemnify him in case Franklin avoided the bail bond in the Thayer case (Record, p. 1).

(8.) The claim of the surety Silsby upon the money he held to indemnify him in case Franklin avoided the bail bond in the Flanders case (Record, p. 1).

(9.) Claims by the trustee in bankruptcy against one of the parties and against counsel for costs incurred by the trustee in proceedings begun by him in a State court and decided adversely to him after full hearing (Record, pp. 2, 3, 4, 5).

None of the above matters are within the jurisdiction of the bankruptcy court. All must be determined in the courts

where, but for the bankruptcy, the bankrupt might have prosecuted them.

Bardes *vs.* Hawarden Bank, 178 U. S., 524.
Mitchell *vs.* McClure, 178 U. S., 539.
Hicks *vs.* Knost, 178 U. S., 541.
Bryan *vs.* Bernheimer, 181 U. S., 188.
Mueller *vs.* Nugent, 184 U. S., 1.

The filing by Thayer of her proof of claim, reserving her rights in the security, did not operate to give the district court jurisdiction to determine the value of her security. That question remained to be determined in the State courts.

Bankrupt Law, section 57, *h*.

The appellees, believing this appeal is groundless and vexatious, pray for costs.

CLARENCE W. ROWLEY,
For the Appellees.

Supreme Court of the United States.

No. 81.—October Term, 1902.

Harry J. Jaquith, Trustee in Bankruptcy of William S. Franklin, Bankrupt, Appellant, vs. Clarence W. Rowley et al. } Appeal from the District Court of the United States for the District of Massachusetts.

[February 23, 1903.]

The appellant herein was appointed a trustee in bankruptcy by the United States District Court in Massachusetts on September 18, 1900, and his bond was approved on the 21st of that month. The bankrupt was duly adjudged such on August 15, 1900, and at the date of that adjudication there were pending in the Superior Court of Massachusetts, for Middlesex County, two suits, one of E. W. Thayer against the bankrupt, in which a bail bond had been taken on November 14, 1899, and the other a suit of E. F. Flanders against the bankrupt, in which case a bail bond had also been taken on that day, and in order to protect the surety, Joseph P. Silsby, Jr., on the bail bond in each of the two cases, the bankrupt on the same day deposited in the hands of the surety the two sums of $148 in the Thayer suit and $125 in the Flanders suit. These sums were to be held to indemnify the surety in each case, respectively, if the bankrupt avoided the bail bond. After the adjudication in bankruptcy these suits proceeded to judgment in the State court and the plaintiffs took out execution, which they are seeking to enforce against the surety on the bail bond, but not against the bankrupt himself.

At the first meeting of the creditors the plaintiff Thayer in the suit in the State court against the bankrupt appeared in the bankruptcy court and proved her claim for $150. Flanders, the plaintiff in the other suit in the State court, did not appear or prove his claim. After the appointment of the trustee, and without leave of the bankruptcy court, and without notice to or the knowledge of the trustee, the plaintiff in each of the two suits took judgment by default in the State court. Upon learning of the entry of the judgments the trustee notified the surety not to pay the money over, and then, in the name of the bankrupt, petitioned the State court to vacate the judgment and to order the execution returned, which the State court refused to do, and thereupon the trustee filed his petition in the District Court of the United States for the District of Massachusetts against the plaintiffs in the two suits, their attorney and the surety,

setting up that the prosecution of the suits in the State court was contrary to the provisions of the bankruptcy act and a contempt of court, and praying that the plaintiffs and their attorney be enjoined from collecting the judgments, and that the surety be enjoined from paying the money in his hands, and that the parties, plaintiffs in the judgments and their attorney, be adjudged in contempt, &c. This motion was denied and the restraining order refused.

The petition was subsequently amended by leave of the court so as to ask that the plaintiffs and their attorney in the State suits be enjoined from collecting the judgments or making any levy under the execution or taking any further proceedings thereon pending the further and final determination of the court in bankruptcy upon the petition of the trustee, and also that the surety, Joseph P. Silsby, Jr., be ordered to pay over to the trustee the funds deposited in his hands; also that the several plaintiffs in the State suits be ordered to appear before the referee in bankruptcy and prove their claims against his estate and establish their liens, if any, upon the funds paid over to the trustee by Joseph P. Silsby, Jr. This amended petition omitted the prayer that the plaintiffs in the suits in the State court might be adjudged guilty of contempt, &c. Upon the petition as amended a motion for a rehearing was made and granted, and the appellees appeared and objected that the court had no jurisdiction in the matter of the petition, and after argument the court so held and denied the petition for want of jurisdiction only, and allowed an appeal to this court.

In dismissing the petition the district judge certified that the following questions arose before him, namely:

"1. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankruptcy act of 1898, control and limit the jurisdiction of the several District Courts of the United States, so that said courts cannot permanently enjoin a creditor of the bankrupt who *has* proved his debt in the bankruptcy court, from collecting a judgment recovered in the State court and from making levy under an execution taken out on said judgment; and do they limit the jurisdiction of the said courts so that these courts may not require said creditor to submit the controversy to their judgment?

"2. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankruptcy act of 1898, control and limit the jurisdiction of the several District Courts of the United States, so that said courts cannot permanently enjoin a creditor of the bankrupt who *has not* proved his debt in the bankruptcy court, from collecting a judgment recovered in the State court, and from making levy under execution taken out on said judgment; and do they limit the jurisdiction of the said courts so that these courts may not require said creditor to submit the controversy to their judgment?

"3. Do the provisions of the second clause of section 23 of the act of Congress, known as the bankruptcy act of 1898, control and limit the jurisdiction of the several District Courts of the United States over controversies between the trustee and a third person in the possession of prop-

erty alleged to belong to the bankrupt, it being also alleged that said third person has no beneficial interest in the said property, but has the sole duty of paying or delivering it over in settlement of the debts of the bankrupt?

"4. Can the District Court of the United States entertain jurisdiction of proceedings on petition by a trustee in bankruptcy to recover property alleged to belong to the bankrupt, but held under a claim or lien or security by the bankrupt's creditor, or by third parties for the benefit of said creditors?

"5. Can the District Court for the District of Massachusetts take jurisdiction over this suit as it now stands on record?"

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

This proceeding is governed by the principles decided in *Bardes* v. *Hawaden*, (178 U. S. 524;) *Bryan* v. *Bernheimer*, (181 Id. 188,) and *Mueller* v. *Nugent*, (184 Id. 1.)

The objection that it is not a suit within the meaning of the twenty-third section of the bankruptcy law is without force. The proceeding was a summary application to the court in bankruptcy to grant an order in a matter, the result of the granting of which would be to immediately take from the surety moneys which had been deposited with him before the commencement of the proceedings in bankruptcy, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. It would also enjoin the plaintiffs in the State suits from proceeding to collect their judgments from the surety in the bail bonds. To extend such a jurisdiction over an adverse claimant would be within the prohibition of section 23, *a* and *b*, whether such jurisdiction were exerted by an action strictly so-called or by a summary application to the court in bankruptcy. It is the exercise of jurisdiction which the section prohibits, and the particular method of procedure in the court is immaterial. The surety in whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the act, and could not be proceeded against in the bankruptcy court unless by his consent, as provided for therein. It is not necessary in order to be an adverse claimant that the surety should claim to be the absolute owner of the property in his possession. It is sufficient if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond and that liability had not been determined and satisfied. If the trustee desire to test the question of the right of the surety to retain the money he must do so in accordance with the provisions of the section of the bankrupt law above referred to.

Bryan v. *Bernheimer*, (181 U. S. *supra*,) does not, so far as the question here involved is concerned, touch or limit the decision in *Bardes* v. *Hawarden*, (178 U, S. *supra*.)

In *Mueller* v. *Nugent*, (183 U. S. 1,) it was claimed that where property of a bankrupt came into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which the agent asserted no adverse claim, the bankruptcy court, nevertheless, had no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed. In regard to this claim it was said by the court, through Mr. Chief Justice Fuller, as follows:

"In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a State court, as the case may be? If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient. The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication and expense, intended to be avoided by the simpler methods of the bankrupt law.

* * * * * *

"The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent.

* * * * * *

"In this case, however, respondent asserted no right or title to the property before the referee, and the circumstances under which he held possession must be accepted as found by the referee and the District Court.

* * * * * *

"In the case before us, William T. Nugent held this money as the agent of his father, the bankrupt, and without any claim of adverse interest in himself. If it was competent to deal with Davidson, the assignee in the case of *Bryan* v. *Bernheimer*, by summary proceedings, William T. Nugent could be dealt with in the same way."

In other words, Nugent's case simply holds that, where the agent held money belonging to the bankrupt, to which he made no claim, but simply refused to give up the property, which he acknowledged belonged to the bankrupt, the bankruptcy court had power, by summary proceedings, to order him to deliver such property to the trustee in bankruptcy.

The case before us is wholly different. The surety claims the right to hold the money as against everybody until his liability on the bail bond is satisfied, and that claim is adverse to any claim that the trustee may make upon him for the money which is to indemnify him as stated.

There is no difference between the two plaintiffs in the State court on account of one having proved her claim in bankruptcy and the other

having failed so to do. She did not waive her claim against the surety in the bail bond even by implication, but, on the contrary, stated that she intended to retain the same.

If the trustee has the right to obtain possession of the money from the surety, he must assert it in accordance with the provisions of section 23 of the bankruptcy act and not by this summary proceeding in bankruptcy.

The plaintiffs in the suits in the State court had the right to proceed to judgment in that court and to collect their judgments against the surety on the bail bond, and the court in bankruptcy had no power to prevent such proceedings in suits over which the State court had full cognizance. (*Eyster* v. *Gaff*, 91 U. S. 521, cited in *Bardes* v. *Hawarden &c., supra.*)

Our conclusion is that the District Court was without jurisdiction in the matter submitted to it in the petition of the trustee, and its decree dismissing such petition for want of jurisdiction is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.